SUPREME COURT, U. S.
JUL 27 1970
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IN THE

Supreme Court of the United States

October Term, 1970

No. 427

SIDNEY E. DAWSON,

Petitioner,

versus

ROBERT H. FINCH, Secretary of Health, Education and Welfare,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE
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No.

SIDNEY E. DAWSON,
Petitioner,

versus

ROBERT H. FINCH,
Secretary of Health, Education and Welfare,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Petitioner prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on May 12, 1970. Motion for a rehearing was timely made and overruled on the 18th day of June, 1970; and copies thereof are appended to the petition in the Appendix at page 14. The jurisdiction of this Court is invoked under 28 USC. 1254(1). As far as the petitioner knows, the said opinion of the Court has not been officially reported.

STATEMENT

The jurisdiction of the trial Court is conferred by Statute, 42 U. S. C. A. 406 (b) (1), as amended.

Lee W. Weldon's case, claimant herein was tried by his plaintiff's counsel on June 16, 1966 before the Hearing Examiner, who denied his claim, and was appealed by counsel to Appeals Council at Washington and likewise denied. The counsel, petitioner herein in due time made application to the trial Court to set his fee with his brief on record, showing the facts and law in favor of claimant, together with his complaint. After the defendant Secretary considered the same and without filing an answer, asked the Trial Court for a remand; and an order dated February 20, 1967 by the Court, it was remanded to the Administration for further consideration. It was again tried by the Hearing Examiner on April 28, 1967, petitioner's counsel representing him, and the trial resulted in favor of the client, Lee W. Weldon, and the decision was affirmed by the Appeals Counsel. After same petitioner herein, petitioned the Appeals' Council to set his fee, and was set by him under 42 U. S. C. A. 406 (a), giving the petitioner 25 per cent of the accrued benefits coming to the claimant, in the sum of $625.58. Tr. 1, which was reasonable.

In like manner petitioner herein, petitioned the Honorable Trial Court to set his fee in the same amount, it being reasonable in the sum of $625.58, being 25 per cent of the accrued benefits, under statute 42 U. S. C. A. 406 (b) (1); and that after a pretrial hearing the Court dismissed same on the ground that the trial court did not have jurisdiction (because 25 percent received in the Social Security Administration was all that he could get). Tr. 7.

The record shows that the plaintiff-appellant, petitioner, herein, tried this case twice, appealed it two different times, filed a brief of record and a complaint before the remand. It is agreed that there are no issues of fact, but issues of law, Tr. 14, 15.

The Petition for Certiorari is based on the Supreme Court Rule 19, Rule 23 and other Rules will be mentioned, as we proceed.

The grounds upon which the said petition for certiorari are based are as follows:

QUESTIONS PRESENTED

Whether the decision of the Court of Appeals for the Fifth Circuit herein is in direct conflict with the decisions of the Court of Appeals for the 1st, 4th, and 6th Circuits, and many Supplement cases; and in conflict with Statute 42 U. S. C. A. 406 (b) (1), 42 U.S.C.A. 406(a), and Code of Federal Regulations, Title 20, Section 404.974(a), all as follows:

1. Whether the decision of the Court of Appeals for the Fifth Circuit herein is in direct conflict with the first point as set out in said petition for rehearing in holding that the Social Security Administration has in effect the authority to determine the amount of the fee of attorney where his services were rendered in a case in the United States District Court?

Whether it is elementary that the Social Security Administration has sole jurisdiction to determine and evaluate the services of an attorney's fee rendered the claimant in the administration proceedings; and likewise whether the Court has sole jurisdiction to evaluate the services rendered by an attorney for the claimant in a judicial proceeding and to set his fee thereby?

The respondent, Secretary herein by taking cognizance of what happened in the administration proceeding as set up in this pleading, says you, petitioner, received an attorney's fee in the administration proceedings of 25 per cent of the accrued benefits coming to claimant as a fee, therefore, you are not permitted to receive any more in the district court, for the services performed on securing a remand.

2. Whether said ruling is in direct conflict with 20 C. F. R. providing that any services rendered by any representative in any proceeding before any State or Federal Court shall not be considered services rendered in any proceeding before the Social Security Administration, (for the purpose of setting a reasonable fee)? To set the same out in verbatim, the Code of Federal Regulations Title 20, Chapter 111, page 454 provides:

> "Section 404.074 (a) Representation of claimant in court proceeding. Any service rendered by any representative in any proceeding before any State or Federal Court shall not be considered services in any proceeding before the Social Security Administration for purposes of

(setting a reasonable attorney's fee), citing Britton v. Gardner, 270 F. Supp. 412.

Whether it is thereby shown if petitioner, Dawson, had he received any attorney's fee for the services performed by him for his client in the United States District Court, whether it could not be received before the Administration Proceeding, and could not be set up as a defense by them, which was done in this case at bar?

3. Whether the Court's decision is in direct conflict with the statute 42 U. S. C. A. 406(b) (1), which provides:

> "Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past due benefits to which the claimant is entitled by reason of such judgment, and the Secretary may, notwithstanding the provisions of section 405(i) of this title, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph".

Whether the court's decision is in conflict with the same, and whether the statute becomes inoperative, of no effect and void if the administration proceedings under 42 U. S. C. A. 406(a) awards an attorney a fee in the sum of 25 per cent for his successful representing the claimant before the administration proceedings; and when the attorney asks for a reasonable fee before the district court under said statute 406(b)(1) wherein said attorney either gets a remand or judgment on the merits, then the Secretary comes in and says: "You cannot get anything in addition, you have already got your fee"; and whether it appears the statute becomes void.

> The statute, 42 U. S. C. A. 406(a) provides as follows: The attorney who represents the claimant before the Social Security Administration and it is shown that he secured substantial gains for the claimant; and in order for him to obtain a reasonable fee for his representation must fill out an application being 20 C. F. R. Sec. 404.975(b), and show good cause for same, which petitioner did. And under 42 U. S. C. A. 406(a) he must show his fee to be reasonable, and is limited to not in excess of 25 per cent of the accrued benefits coming to the claimant as his fee. The attorney, petitioner herein received the said 25 per cent; and was truly in the jurisdiction of the Social Security Administration.

4. Whether the Court's decision is in conflict with the statute 42 U. S. C. A. 406(a) providing in substance

that when an attorney represents the claimant in the Administration Proceeding and the claimant receives substantial gains from his representation, the attorney is entitled to a reasonable fee not exceeding 25 per cent of the accrued benefits coming to the claimant as his fee; but if in the first place he receives his 25 per cent for his successful gains made to the claimant from the district court, after which he asks for his reasonable fee coming from the Administration, and is turned down on the ground that he has already received 25 per cent from the judicial proceedings the said statute becomes inoperative and void.

Petitioner herein would like for this Honorable Court to review the above 4 issues as questions as provided in Rule 23(c).

5. Whether the following cases and their circuits are in conflict with the decision of the Court in holding that if an attorney who appears in two forums should apply to each for the aliquot part of his total fee? Gardner v. Menedez, 373 F. 2d 488, 1967, First Circuit; Britton v. Gardner, 270 F. Supp. 412; and McKittrick v. Gardner, 378 F. 2d 872, 1967, 4th Circuit.

Whether these three cases would be in conflict with the decision of the Trial Court and the Decision of the Circuit Court of Appeals, because if one of the forums should give the attorney a reasonable fee of 25 per cent of the aliquot part of his total fee, would it deprive the other forum of its jurisdiction to give anything, and whether it would make it inoperative and void? That is the question in the case at bar.

6. And furthermore in the case of McKittrick v. Gardner as above shown, the court found in that case that there was a contingent fee contract, (same as the case at bar) the trial court approved a fee of 25 per cent on account of the contingent fee contract, the Secretary appealed on the ground that it was a contingent fee contract and too much, the Court of appeals remanded the case for further consideration on the ground that the fee was not proved to be reasonable; but the said court said it was up to the trial court to set and determine the fee after it was proved reasonable, that the Court had nothing to say about that. The court further said that the law was intended for an attorney to get part of his fee from each forum; and that in the same opinion and decision, the court held that where a counsel appears in two forums for his client or claimant, he should ask each for the aliquot part of his total fee. The question is:

Whether if the lower court granted the attorney a reasonable fee of 25 per cent of the accrued benefits coming to the claimant, would that preclude the attorney from receiving a reasonable attorney's fee for representing the claimant before the administration proceedings under 42 U. S. C. A. 406(a)?

SECRETARY'S DEFENSE IN LOWER COURT

In addition to the above when the petitioner herein filed his complaint in the trial court asking the court to set him a reasonable fee for the services performed under 42 U. S. C. A. 406(b) (1) as shown in his complaint and under his first Supplemental petition, Ap-

pendix p. 19, the Secretary filed a motion to dismiss on the following ground:

> On page 2 of said motion, Tr. 2, 3, it alleges "for any attorney, representing a claimant before a court to obtain allowance of a fee from the court for his services in the court must have entered a 'judgment favorable' to the claimant the attorney represented and if such a judgment obtained the court then could award him a fee not in excess of 25 per cent of past due benefits payable to the claimant under the court's judgment". And on page 3 of such brief Tr. 2, 3 to dismiss, further states:
>
> "No award was made by the court and since this is so, no award of a fee could be made by the court to the attorney pursuant to section 206 (b) of the Social Security Act."

In addition to the above and foregoing, the Secretary set up the fact that since petitioner had already received 25 percent of the accrued benefits coming to the claimant in the administration, the same should be dismissed; and the same was dismissed on the ground that the court never did have jurisdiction. The Decision of the Court Affirmed.

7. Petitioner in reply to the above and foregoing has set up in his brief on appeal to said court showing 7 cases where the court granted the right for an attorney to receive a reasonable fee even though the court did not grant a judgment for claimant on the

merits, but was on remand before the Secretary filed his answer. All of said courts mentioned hold substantially as follows:

> "Court could award an attorney's fee for substantial work done before the court, although court entered no judgment for specific benefits for alleged disability, but instead, ordered a remand to Secretary of Health, Education and Welfare who ultimately honored the claim for disability benefits".

Accepting the above and foregoing as true, the question is: Whether the petitioner is cut off from receiving a reasonable fee under 42 U. S. C. A. 406(b) (1), in the judicial proceedings on the remand petitioner obtained since he received a reasonable fee of 25 per cent of the accrued benefits coming to the claimant under 42 U. S. C. A. 406(a), being the Social Security administration?

THE REASONS RELIED ON FOR GRANTING THE WRIT OF CERTIORARI RULE 19

In the first place after thorough investigation on the part of the petitioner herein, in searching all the Federal Court records, and making extensive inquiry, petitioner finds no authority or Federal Court holding that when an attorney receives 25 per cent of the accrued benefits coming to the claimant in any one forum, that is all that he can get. As I understand this is the ruling and decision of the court herein. Since we have two forums involved in all of these Social Security

cases, is each forum supreme within its sphere of action?

On page 3 of the Court's Opinion, the Court says that this is a novel question.

The court says: "The novel question on this appeal is whether, under the provisions of section 206(b) of the Social Security Act, as amended, 42 U. S. C. A. Section 406(b), an attorney who has been authorized by the Secretary of Health, Education and Welfare to charge a fee of twenty-five per cent of the claimant's accrued benefits for his representation of the claimant in the administrative proceeding may obtain authorization from the District Court to charge an additional twenty-five per cent for his representation of the claimant before the Court." May the petitioner herein qualify the above by saying that the petitioner herein asked for a reasonable fee under the statute 42 U. S. C. A. 406 (b) (1) in the District Court, and thought that he ought to have 25 per cent for he only got a small fee in the other forum. The District Court could have given any fee not exceeding 25 per cent of the accrued benefits coming to the claimant, if he so desired, if it was reasonable.

The court says that this is a novel question for he cites no authority or cases holding same.

This is a far reaching opinion and it will go down as authority in the United States in all of the many different courts thereof as a precedent to follow; and the lawyers and all courts are supposed to follow the

same together with all who are connected with the Social Security Act of the United States.

It appears in conflict with quite a few decisions and circuits as cited above where the decisions of the courts hold that if an attorney appears for the claimant in two different forums, he must apply to each for the aliquot part of his total fee; and that if one forum gives the attorney 25 per cent of the accrued benefits coming to the claimant as his fee, however small and inadequate it might be he is precluded from seeking a fee in the other forum, contrary to statute.

In order to make all the circuits and decisions uniform, it should come from the decisions of the Honorable Supreme Court of the United States of America.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari be granted.

Sidney E. Dawson, Petitioner,
Attorney for Himself,
1221 Davis Building,
1309 Main Street
Dallas, Texas 75202.

CERTIFICATE OF COUNSEL

I, Sidney E. Dawson, as Petitioner do hereby certify that the foregoing petition for a Writ of Certiorari is presented in good faith and not for delay.

_____

CERTIFICATE OF SERVICE

I, Sidney E. Dawson, Attorney for Petitioner in the above entitled cause, hereby certify that on the ____ day of July 1970, I served the attached Petition for Writ of Certiorari upon Miss Kathryn Baldwin, Respondent, Washington, D. C. 20530.

_____

APPENDIX

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK
Edward W. Wadsworth, Clerk
Room 408 — 400 Royal St.
New Orleans, La. 70130

June 29, 1970

Mr. Sidney E. Dawson
Attorney at Law
Davis Building
Dallas 2, Texas

No. 28364 — Sidney E. Dawson vs.
Robert H. Finch, etc.

Dear Mr. Dawson:

Receipt is acknowledged of your letter of June 27 together with enclosed motion for stay of the issuance of the mandate pending petition for writ of certiorari. As you now know, the mandate has already been issued since the application for stay was not filed prior thereto which now requires that you file a supplement to the motion requesting a recall and stay of the issuance of the mandate, if you consider that necessary. However, there is no rule requiring that a mandate be stayed in order for an application for writ of certiorari to be filed. Since you were unsuccessful below

and unsuccessful here, there may not be any necessity for you to stay the issuance of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk
(Signed) G. F. GANUCHEAU
G. F. Ganucheau
Chief Deputy Clerk

GFG:cfs
cc: Miss Kathryn H. Baldwin

Brief by Sidney E. Dawson

Since the trial Court dismissed this cause of action in the lower court for want of jurisdiction, and was affirmed by the higher court.

There was no judgment entered against the petitioner herein upon which execution can issue, and there was no need of a stay, the same was dismissed. Vol. 5, Benders Forms 5069, Sec. 234.1

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No. 437

In the Supreme Court of the United States

OCTOBER TERM, 1970

SIDNEY E. DAWSON, PETITIONER

v.

ELLIOT L. RICHARDSON,
SECRETARY OF HEALTH, EDUCATION AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 427

SIDNEY E. DAWSON, PETITIONER

v.

ELLIOT L. RICHARDSON,
SECRETARY OF HEALTH, EDUCATION AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

---

1. The facts in the case, as stated by the court of appeals (Pet. Supp. App. 5-6), are undisputed. Petitioner Dawson is an attorney who represented a claimant for social security disability benefits. He began such representation at the administrative hearing; the hearing examiner denied benefits; and the Appeals Council denied review. Dawson and the claimant then made a 50 percent contingent fee con-

tract, and Dawson instituted an action in the district court for judicial review of the administrative denial of benefits.

On motion of the Secretary before answer, the case was remanded for further administrative proceedings, which resulted in an award of accrued benefits of $2,502.30. Dawson collected half of this amount as his fee and then sought the Secretary's approval of that fee. The Secretary authorized a fee of $625.58—25 percent of the accrued benefits—for Dawson's services in representing the claimant in the administrative proceedings, and advised Dawson that charging a greater fee would expose him to the penalties provided in 42 U.S.C. (Supp. V) 406(a).

Dawson brought the present action in the district court, seeking a fee of $625 for representing the claimant before the court. The district court dismissed the complaint and the Fifth Circuit affirmed. It held that 42 U.S.C. 406 "precludes the aggregate allowance of attorney's fees greater than twenty-five percent of the past due benefits received by the claimant," the amount which the Secretary had authorized (Pet. Supp. App. 12).

2. The court of appeals correctly held that 42 U.S.C. 406(b) bars a court from granting an attorney's fee in social security disability cases where the Secretary has already awarded a fee of 25 percent of the accrued benefits. That section (Pet. Supp. App. 6-7) permits a district court, upon rendering a judgment in favor of a claimant, to allow an attorney's fee "not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by

reason of such judgment," and authorizes the Secretary to pay that fee directly to the attorney out of the accrued benefits. The legislative history the court of appeals cited indicates that Congress intended to preclude the charging of "inordinately large fees" in social security cases—which one witness at the hearings described as "frequently one-third to one-half of the accrued benefits" (Pet. Supp. App. 9). It would violate this policy for the court to award petitioner a fee in addition to the 25 percent given by the Secretary.

Contrary to petitioner's contention (Pet. 3, 7), the decision below is not in conflict with the decisions of any other courts of appeals. As the court of appeals below pointed out, "[n]one of these cases support the allowance of separate twenty-five percent fees by the Secretary and the court. In fact, none of the cases authorized a total fee in excess of twenty-five percent" (Pet. Supp. App. 11).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1970.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONER IN ANSWER TO THE MEMORANDUM FOR THE RESPONDENT IN OPPOSITION BY SOLICITOR GENERAL

Sidney E. Dawson
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF FOR THE PETITIONER IN ANSWER TO THE MEMORANDUM FOR THE RESPONDENT IN OPPOSITION BY SOLICITOR GENERAL

Petitioner herein invokes Supreme Court Rule 24, Section 4; and states that he adopts the statement of the nature and result of the case as provided as shown in the Petition for a Writ of Certiorari, filed in this Court.

The defense as shown and set up by the Honorable Solicitor General herein, is among other things shown in paragraph 2 on page 2, as follows:

"2. The court of appeals correctly held that 42 U. S. C. 406(b) bars a court from granting an attorney's fee in social security disability cases where the Secretary has already awarded a fee of 25 per cent of the accrued benefits. That section (Pet. Supp. App. 6-7) permits a district court, upon rendering a judgment in favor of a claimant, to allow an attorney's fees "not in excess of 25 per cent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment," and authorizes the Secretary to pay that fee directly to the attorney out of the accrued benefits. The legislative history the court of appeals cited indicates that Congress intended to preclude the charging of "inordinately large fees" in social security cases — . It would violate this policy for the court to award petitioner a fee in addition to the 25 per cent given by the Secretary".

Petitioner says in answer to same, the trial court, the Secretary, neither the Honorable Circuit Court of Appeals for the Fifth Circuit has cited a single case holding that 42 U. S. C. A. 406(b) bars a court from granting an attorney's fee in social security disability case where the Secretary has already awarded a fee of 25 per cent of the accrued benefits; nor has Congress passed a law holding or providing for the same. If that is the law, it appears that Congress would provide the same by statute.

Congress has tried together with the Secretary to take care of this situation by passing two inde-

pendent statutes. One statute, 42 U. S. C. A. 406(b) (1), provides:

> "Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its *judgment a reasonable fee for such representation, not in excess of 25 per cent of the total of the past due benefits* to which the claimant is entitled by reason of such judgment —.

The other Statute, 42 U. S. C. A. 406(a) provides as follows:

> The attorney who represents the claimant before the Social Security Administration and it is shown that he secured substantial gains for the claimant, he must show his fee to be reasonable, and is limited to not in excess of 25 per cent of the accrued benefits coming to the claimant as his fee. — .

In the petition for rehearing, Petitioner set up the following Point.

POINT 1 (RESTATED)

> The court erred in holding that the Social Security Administration had authority and jurisdiction to determine the fee for an attorney in a case in the U. S. District Court, based upon a

judgment or a remand since the amendment of 1965.

Statement.

The trial Court and the Appellate Court dismissed the case at bar on the ground that the petitioner had received 25 per cent of the accrued benefits coming to the claimant in the Social Security Administration for his fee and that was all that he could get as an attorney for representing the claimant in the administrative proceedings and that he could not get anything for representing the claimant in the U. S. District Court even where substantial gains accrued to the claimant and dismissed the same for want of jurisdiction.

Argument and Authorities.

It is shown here both of said courts refused to take jurisdiction of this case under 42 U. S. C. A. 406(b)(1) where petitioner secured a remand for the claimant; but instead assumed the cause of action that had been awarded in the administration proceedings, and not by any judicial proceedings.

The Social Security Administration has sole jurisdiction to determine and evaluate the services of an attorney's fee rendered the claimant in the administrative proceedings; and likewise the Court has sole jurisdiction to evaluate the services rendered by an attorney for the claimant in a judicial proceeding and to set his fee thereby. The courts hold the jurisdiction of the Secretary is as follows:

"Under this section providing that secretary may prescribe maximum fees which may be charged for services performed in connection with any claim before the Secretary, he has sole jurisdiction to pass on an amount of fees charged by attorneys for services rendered in the Administration proceedings before the Secretary, but he does not have jurisdiction to fix fees which may be charged by an attorney for representing his client in a judicial proceeding to review a decision of the Secretary" Sheppard v. Fleming, 189 F. Supp. 571; Ray v. Gardner, 387 F. 2d 162. 1967 4th Cir.; Britton v. Gardner, 270 F. Supp. 412.

Ray v. Gardner, 387 F. 2d 162 holds: "Court had no jurisdiction to make an award of a fee for services in the administrative proceedings.

"For that reason, the case will be remanded to the District Court with leave to counsel, if he so advised, to apply to the Administrator for an allowance of a reasonable fee for services rendered in the administrative proceedings and to the District Court for a reasonable fee for services rendered in that Court". Each forum is supreme within its own sphere of action, and neither can usurp the jurisdiction of the other.

It appears that if the United States District Court had taken jurisdiction of this cause of action as set

up in petitioner's First Supplementary Petition, showing a reasonable fee should be granted on page 19 of the Appendix in the appellate court, quoting the statute under 42 U. S. C. A. 406 (b) (1), wherein the court could have granted petitioner a reasonable fee in any amount not in excess of 25 per cent of the accrued benefits coming to the claimant; because it is held if any proceedings held by a representative before any State or Federal Court shall not be considered services in any proceeding before the Social Security Administration for the purposes of setting a reasonable fee, which shows said provisions in Code of Federal Regulations, Title 20, Chapter 111, page 454, as follows:

> "Section 404.074 (a) Representation of claimant in court proceeding. Any service rendered by any representative in any proceeding before any State or Federal Court shall not be considered services in any proceeding before the Social Security Administration for purposes of (setting a reasonable attorney's fee), citing Britton v. Gardner, 270 F. Supp. 412." Under this law if the court had granted petitioner a reasonable attorney's fee Secretary would have no defense to it.

In the case of Gardner v. Menedez, 373 F. 2d 488, 1967, First Circuit, holding:

> "That a court is the appropriate one to determine the value of the services rendered before it, and by implication, it is not for the court to

determine the value of service rendered elsewhere.

"For the services performed before the agency, the Secretary may award appropriate counsel fees. 42 U. S. C. A. 406(a).

"Section 206(b) (1) does not expressly revoke this provision. On the contrary, we see no point in considering it revoked pro tanto by implication. On the contrary, we see every reason for continuing the principle that the agency before whom service was rendered should be the one to determine their value."

In addition, the Solicitor General as quoted above, further says in the latter part of paragraph 2, page 2, "That section (pet. Supp. App. 6-7) permits a district court upon rendering a judgment in favor of claimant, to allow an attorney's fee 'not in excess of 25 per cent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment', and authorizes the Secretary to pay that fee directly to the attorney out of the accrued benefits". Petitioner says this is true, and *courts construe a remand the same as a judgment.*

The Secretary's Defense In The Courts

When the petitioner herein filed his complaint and said Supplementary Petition in the trial court asking the court to set him a reasonable fee for the services performed before the court on a remand under statute

42 U. S. C. A. 406(b) (1), the Secretary filed a motion to dismiss on the following ground:

On page 2 of said motion, Tr. 2, 3, it alleges

> "for any attorney, representing a claimant before a court to obtain allowance of a fee from the court for his services in the court must have entered a 'judgment favorable' to the claimant the attorney represented and if such a judgment obtained the court then could award him a fee not in excess of 25 per cent of past due benefits payable to the claimant under the court's judgment".

And on page 3 of such motion Tr. 2, 3 to dismiss, further states:

> "No award was made by the court and since this is so, no award of a fee could be made by the court to the attorney pursuant to section 206(d) of the Social Security Act."

In addition to the above and foregoing, the Secretary set up the fact that since the petitioner had already received 25 per cent of the accrued benefits coming to the claimant in the administration, the same should be dismissed; and the same was dismissed on the ground that petitioner could not get any more.

POINT 3 (RESTATED)

Counsel has a right to recover a reasonable fee on remand for services to his client, al-

though a judgment was not obtained on the merits, and the opinion of the court is in conflict with the law.

Statement

And it appears also that the defense of the Secretary sets up the fact as shown above that since the court did not render a "judgment favorable" to claimant, is not able to receive anything under the law, but this is a mistake and an error, for the courts hold that where the claimant secures an order from them on remand, it is the same as and equivalent to and synonymous to a "judgment," and the attorney and claimant have the same rights to recover on the remand for all their benefits the same as a judgment, which is shown by the following cases, which hold:

Argument and Authorities.

"Court could award an attorney's fee for substantial work done before the court, although court entered no judgment for specific benefits for alleged disability, but instead, ordered a remand to Secretary of Health, Education and Welfare who ultimately honored the claim for disability benefits". Conner v. Gardner, 381 F. 2d 497, 4th Cir. (1967); Robinson v. Gardner, 374 F. 2d 949, 1967, 4th Cir.; Ray v. Gardner, 387 F. 2d 162, 1967, 4th Cir.; Gardner v. Menedez, 373 F. 2d 488, 1st Circuit, 1967; Carroll v. Celebrezze, 228 F. Supp. 340; Brown v. Gardner, 387 F. 2d 345, 1967, 4th Circuit; Philpott v.

Gardner, 403 F. 2d 774, 1968, Sixth Circuit. By further investigation other cases could be added to this number.

And the said Solicitor General, in said paragraph two, near the bottom of said paragraph and in the Court's opinion on page 8 (Pet. Supp. App.) which shows, "the legislative history — indicate that Congress intended to preclude the charging of 'inordinately large fees' in social security cases — . It would violate this policy for the court to award petitioner a fee in addition to the 25 per cent given by the Secretary".

In answer to same, petitioner says it all depends upon the accrued benefits coming to the claimant, if claimant has a very large amount coming to him of course 25 per cent of the accrued benefits would be too much and exorbitant and unreasonable. On the other hand in case of a small amount coming to the claimant as accrued benefits, it might be that 25 per cent would be enough coming to the claimant as accrued benefits, which amount could be awarded to the attorney for a reasonable fee. It is up to the administrative proceedings to see that the attorney gets a reasonable fee under 42 U. S. C. A. 406(a) and the courts should be the safeguard to see that the attorney gets a reasonable fee under 42 U. S. C. A. 406(b) (1), and in view of this, it appears that Congress was wise in passing two distinct jurisdictions to deal out justice and equity to all. Each forum should see that attorney receives a reasonable fee for his services rendered his client, and exhorbitant fees should not be given and held void. For an example,

In Conner v. Gardner, 381 F. 2d 497, 1967, 4th Cir. the Social Security Administration awarded the attorney $1,000.00 as a reasonable fee, and the Court found that his fee should be $844.16, making in all the sum of $1,844.16, which amounted to about 20 percent of the total benefits coming to him. Now subtract $625.58 that petitioner received from the administration proceedings as 25 percent due him and we have $1218.58 which was received more than the petitioner. And that if the Court had entertained and given him jurisdiction on the work he did in the District Court under said statute on a reasonable fee not in excess of 25 per cent of the accrued benefits coming to the claimant, say that he could give him any amount under that, but say that he gave him the limit which would be another 25 percent, making in all $1251.16 that much from the said $1844.16 which would be $593.00 more than the petitioner received from both forums.

In Brown v. Gardner, 5th Cir. 1967, 387 F. 2d 345, it is found the sum of $16,833.60 was the accrued benefits coming to the claimant. The Secretary paid the attorney as a fee $1487.90 and the Court allowed him the sum $1389.17, making in all from both forums the sum of $2,877.17, which shows the attorney was paid a little more than 20 percent. Take $625.58 the sum that petitioner received in the Administration proceedings and we have $2,252.01 more than the petitioner received. It takes almost as much work to get a small case through the administration proceedings and court and processed as a large one. If in 2 forums he got 1/4 each that makes $1251.16 that from $2,877.17 makes $1626.01 more than petitioner.

Since the trial court and the appellate court says that petitioner received $625.16 being 25 per cent of the accrued benefits coming to the claimant in the Social Security Administration, which is too much money, and that petitioner should not receive a thing for his work under said statute in the district court, and was dismissed with prejudice for lack of jurisdiction, under the statute of July 30, 1965.

Substantial gains have accrued to the claimant since he has received his benefits, and now his benefits have been raised and he is getting approximately $175.00 per month, and will ordinarily receive the same until he dies. Petitioner began representing the claimant in 1966 and still in court. Petitioner has taken this case through three trials, 4 appeals and still in court, and has spent lots of time and expense trying to settle the same and get my fee set. If it had not been for an attorney the claimant would not have received anything. In addition, petitioner had advanced claimant $52.50 for medical services and reports to Albert Hindler, M.D., and $65.00 to John Stack, M.D. for the same and testifying, and $4.00 for Marshall service, all being $121.50 without expecting anything back.

POINT 2 (RESTATED

The court erred in failing and refusing to hold that when an attorney has tried a case in two forums he has a right to look to each forum for the aliquot part of his total fee. (Supp. App. 14)

Statement

After the said administrative proceedings set petitioner's fee in the said sum of $625.58 being 25 per cent of the accrued benefits coming to the claimant, the petitioner petitioned the United States District Court to set his fee for the services rendered the claimant in the said court under said statute, asking for a reasonable fee, not in excess of 25 percent of the accrued benefits coming to claimant.

Argument and Authorities

It is also understood that the claimant and petitioner herein entered into a contingent fee contract, and if reasonable it should be approved. In the case of McKittrick v. Gardner, 378 F. 2d 872 shows that a contingent fee contract within the law and reasonable should be upheld; and that there is no prohibition against his consideration of the contingency of compensation; and availability of lawyers to such claimants is of the *highest importance*, and holds:

> "While the judge must approve the reasonableness of the fee in every case and not unquestionably endorse contingent fee contracts providing for a fee of not more than 25 per cent of the accrued benefits, there is no prohibition against his consideration of compensation. Availability of lawyers to such claimants is of highest importance, and if a lawyer is to receive no compensation is contingent on whether or not he has a contract that says so.

This said court further held, that the law was intended for an attorney to get a part of his fee from each forum; and in the same opinion and decision the court held that when a counsel appears in two forums for the claimant he should ask each for the aliquot part of his total fee, to quote the exact words of the court are as follows.

> "In Menedez (case) there is nothing singular in the fact that counsel who appears in two forums should apply to each for the aliquot part of his total fee".

In Gardner v. Menedez, 373 F. 2d 488, 1967, First Circuit, not only holds the above quotation, but further holds:

> "In reading the statute, it is requiring *the Court in every case* to fix and determine a reasonable fee for services rendered in Court".

To the same effect is the holding of Ray v. Gardner, 387 F. 2d 162 as heretofore shown. In Britton v. Gardner, 270 F. Supp. 412, holding with the McKittrick in stating:

> "There is nothing singular in the fact that counsel who appears in two forums should apply to each for the aliquot part of his total fee."

POINT 5 (RESTATED)

The court erred in holding that the District Court under the Statute 42 U. S. C. A. 406(b) (1) never had

jurisdiction to set counsel a fee for representing his client in the District Court on a remand whereby the Court could evaluate his services, which opinion of the Court makes said Statute inoperative, and in conflict with said cases set up in Plaintiff-Appellant's brief holding that the District Court had jurisdiction on remand could award attorney's fee despite the fact that it did not render a judgment for benefits.

Statement

The cases set out above together with their circuits showing that claimant and petitioner could recover on a remand the same as a judgment of the court, are in direct conflict with the opinion of the court herein where the court held that it did not have jurisdiction and dismissed petitioner's complaint and cause of action and shows that said statute becomes in effect inoperative and void.

Argument and Authorities

We have already produced these authorities on page 9 herein, and in the way of summary we will produce them again in short as follows:

Conner v. Gardner, 381 F. 2d 497, 4th Cir. 1967; Robinson v. Gardner, 374 F. 2d 949, 4th Cir. 1967; Ray v. Gardner, 387 F. 2d 162, 1967, 4th Cir.; Gardner v. Menedez, 373 F. 2d 488, 1st Cir. 1967; Carroll v. Celebrezze, 228 F. Supp. 340; Brown v. Gardner, 387 F. 2d 345, 1967, 4th Circuit; Philpott v. Gardner, 403 F. 2d 774, 1968, 6th Circuit. In view of the above and foregoing,

we have Conner v. Gardner, Robinson v. Gardner, Ray v. Gardner, Brown v. Gardner, all four, and Gardner v. Menedez of 1st Circuit, and Philpott of the 6th Circuit, all holding that a remand equivalent to and same as a judgment of the Court.

POINT 6 (RESTATED)

The Court erred in holding that the District Court under the statute 42 U. S. C. A. 406(b) (1) never had jurisdiction to set counsel a fee for representing his client in the District Court on a remand wherein the Court could evaluate his services, which opinion of the Court makes said Statute inoperative, and in conflict with said cases set out in Plaintiff-Appellant's brief, holding that where counsel who appears in two forums should apply to each for the aliquot part of his total fee.

Statement

The cases set out above together with their circuits showing that claimant and petitioner could recover on a remand the same as a judgment of the court, are in direct conflict with the opinion of the court herein where the court held that it did not have jurisdiction, which opinion of the Court makes said Statute inoperative and void, and in conflict with said cases set out above, holding that where counsel who appears in two forums should apply to each for the aliquot part of his total fee.

Argument and Authorities

The cases set out above together with their circuits showing that claimant and petitioner could recover on a remand the same as the judgment of the court, holding that where counsel who appears in two forums should apply to each for the aliquot part of their total fee, in the way of a summary are as follows: Gardner v. Menedez, 373 F. 2d 488, 1967, First Circuit; Britton v. Gardner, 270 F. Supp. 412; McKittrick v. Gardner, 378 F. 2d 872, 1967, 4th Circuit; and the case of Ray v. Gardner, 387 F. 2d 162, 1967, 4th Circuit, holding about the same.

The Court held on the last page of the opinion, being page 12 (Sup. App.) that since Dawson received 25 per cent of the past due benefits coming to the claimant he should receive no more, which was paid in the administration proceedings, being 42 U. S. C. A. 406(a) providing among other things that an attorney representing the claimant in the administration is limited to not in excess of 25 per cent of the past due benefits coming to the claimant as his fee; and if the attorney represents the claimant in a judicial proceeding under said 406(b) (1) he is limited to not in excess of 25 per cent of the accrued benefits coming to the claimant as his fee; Court holding petitioner can not receive anything for his services performed in said 406(b) (1) in the District Court; by analogy and implication holds said statute void and inoperative.

And by further analogy and implication, if an attorney first receives his 25 percent fee in the District Court, he is precluded from receiving anything for rep-

resenting his client in the administration proceedings, which in effect holds said statute void and inoperative.

And in addition, it is held if any proceedings held by a representative before any State or Federal Court shall not be considered services in any proceeding before the Social Security Administration for the purposes of setting a reasonable attorney's fee, which shows said provisions in Code of Federal Regulations, Title 20, Chapter 111, page 454, as heretofore shown. Under this provision petitioner could have been granted a reasonable attorney's fee under said statute in the District Court, and could not be considered by the Social Security Administration for the purposes of (setting a reasonable attorney's fee.) This provision of said Code is also held by implication and analogy to be inoperative and of no effect by the decision of said court.

Wherefore petitioner prays that upon the due consideration of the reply brief and record herein that the petition for Writ of Certiorari be granted; and that if said writ be granted and upon the further consideration of said brief and record by the Court, the petitioner humbly prays that said decisions of said courts be reversed, and that a reasonable attorney's fee be set for the petitioner herein.

Respectfully submitted,

Sidney E. Dawson, Petitioner,
6918 Lindsley Ave.
Dallas, Texas 75223,
Tel. DA 1-3522

CERTIFICATE OF SERVICE

I, Sidney E. Dawson, Attorney for Petitioner in the above entitled cause, hereby certify that on the ____ day of September, 1970, I served the attached brief upon Miss Kathryn Baldwin, Respondent, Washington, D. C., and Erwin N. Griswold, Solicitor General, Department of Justice, Washington, D. C. 20530. All parties required to be served have been served, Rule 33, Sec. 3.

T. L. Dawson, Attorney At Law
and a Member of the Bar of
this Court
4328 Underwood St.
University Park, Maryland
Son of Petitioner

By _____
Sidney E. Dawson

ASSIGNMENT OF ERRORS

(Points 1-6)

In the petition for a rehearing IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, the petitioner herein set up the following errors:

Point 1

The Court erred in holding that the Social Security Administration had authority and jurisdiction to determine the fee for an attorney in a case in the U. S. District Court, based upon a judgment or remand, since the Amendment of 1965 to the Act.

Point 2

The Court erred in failing and refusing to hold that when an attorney has tried a case in two forums he has a right to look to each forum for the aliquot part of his total fee.

Point 3

The opinion of the Honorable Court is in conflict with the law holding that counsel has the right to recover a reasonable fee on remand for services to his client, although a judgment was not obtained on the merits of the case.

Point 4

The ruling in the present case is in direct conflict with the decisions of other Courts in similar situations.

Point 5

The Court erred in holding that the District Court under the Statute 42 U. S. C. A. 406(b) (1) never had jurisdiction to set counsel a fee for representing his client in the District Court on a remand whereby the Court could evaluate his services, which opinion of the Court makes said Statute inoperative, and in conflict with the said cases set up in Plaintiff-Appellant's brief holding that the District Court had jurisdiction on remand could award attorney's fee despite the fact that it did not render a judgment for benefits.

Point 6

The Court erred in holding that the District Court under the Statute 42 U. S. C. A. 406(b) (1) never had jurisdiction to set counsel a fee for representing his client in the District Court on a remand wherein the Court could evaluate his services, which opinion of the Court makes said Statute inoperative, and in conflict with said cases set out in Plaintiff-Appellant's brief, holding that where counsel who appears in two forums should apply to each for the aliquot part of his total fee.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 427

SIDNEY E. DAWSON,

Petitioner,

versus

ELLIOTT L. RICHARDSON, Secretary of Health, Education and Welfare,

Respondent.

On Petition for Rehearing in a Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

No. 427

SIDNEY E. DAWSON,
Petitioner.

versus

ELLIOTT L. RICHARDSON,
Secretary of Health, Education and Welfare,
Respondent.

On Petition for Rehearing in a Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

PETITION FOR REHEARING

Petitioner herein invokes Rule 58, Section 2; and states that he adopts the Statement of the Nature and Results of the case as provided and shown in the Petition for a Writ of Certiorari, filed in this Court.

Jurisdiction of Supreme Court Rule 58(2)

A petition for rehearing on a petition for Writ of Certiorari.

The Court denied petition for a writ of certiorari on October 12, 1970. The petitioner now timely asks this

Honorable Court to set aside their denial and hear this cause on substantial grounds available to petitioner although not previously presented, as follows:

POINT 1(a)

The trial court and appellate court erred in the dismissal of this cause for want of jurisdiction with prejudice.

STATEMENT

As a matter of record, which shows the trial court did dismiss this cause for want of jurisdiction is shown herein in the provisions of 42 U. S. C. A. 406 (b) (1), which provides:

> "When a court renders a *judgment favorable* to a claimant under this title who was represented before the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 per cent of the total of past due benefits to which the claimant is entitled by reason of such judgment . . ."

the respondent herein in the trial court alleged this provision of statute, and in addition stated:

DEFENDANT'S DEFENSE

> "There must be a *judgment favorable to the claimant* before the court can award attor-

ney's fees. Duke v. Gardner, 264 F. Supp., 187 (N. D. Georgia, 1967). In the case of a remand the plaintiff's attorney's remedy is through application to the Secretary for attorney's fees."

Among other things, defendant asks the court to dismiss the cause with prejudice. Appendix, p. 26, 27. Tr. 23.

ORDER OF DISMISSAL

On the 2nd day of June, 1969, came on to be heard defendant's motion to dismiss, and the court having examined the pleadings . . . is of the opinion that 42 U.S.C. 406 limits attorney's fees to 25 per cent of claimant's past due benefits, it is therefore ordered adjudged and decreed that plaintiff's complaint is hereby dismissed with prejudice. Signed . . . . . Appendix 29. Tr. 7.

Petitioner's Answer to Respondent's Obtaining a Dismissal for Want of Jurisdiction.

The petitioner as a matter of record has at all times maintained and alleged that in a judicial proceeding resulting *in a remand in favor of the claimant*, the attorney has a right for the court to set a reasonable fee for his services not greater than 25 per cent of the accrued benefits coming to the claimant which is alleged in petitioner's 1st supplementary petition, Ap. 19, and in petitioner's motion for a new trial in Point 1, (Ap. 30) and at all times thereafter.

ARGUMENT AND AUTHORITIES

This whole case hinges on whether the *order on remand* in favor of plaintiff is the same as a judgment for plaintiff, which is determined as set up in the provisions of 42 U. S. C. A. 406 (b) (1) as above set forth.

If in the eyes of the court's decisions that a judgment does not include an order on remand, then in that event the administrator, and proceedings therein, only have jurisdiction, and the petitioner cannot get any more, for he has already received his fee, and the court would be right in dismissing the cause for want of jurisdiction.

On the other hand, if in the eyes of the courts it is said that an *order of remand includes a judgment of court*, then in that event, the jurisdiction of courts have the power to grant attorney's fees as provided by 42 U. S. C. A. 406(b) (1), and the judgment of the trial court and appellate court would lack jurisdiction in this cause, and the same would be void, and should be set aside.

Since the pleadings of the defense say as aforesaid, "there must be a judgment favorable to the claimant before the court can award attorney's fee — In the case of a remand, the plaintiff's attorney's remedy is through application to the Secretary for attorney's fees," and the court dismissed the cause for want of jurisdiction with prejudice, on account of said pleading, the primary cause. Ap. 26, 27, Tr. 23.

THE TRIAL COURT AND APPEALS COURT DID NOT HAVE JURISDICTION ON A REMAND ORDER

> "Court could award an attorney's fee for substantial work done before the court, although the court entered no judgment for specific benefits for alleged disability, but instead, [redacted]ered a remand to Secretary of Health, Education and Welfare, who ultimately forwarded the claim for disability benefits." Conner v. Gardner, 381 F. 2nd 497, 4th Cir. (1967); Robinson v. Gardner, 374 F. 2d, 1967, 4th Cir.; Ray v. Gardner, 387 F. 2d 162, 1967, 4th Cir.; Gardner v. Menedez 373 F. 2d 488, 1st Cir. 1967; Carroll v. Celebrezze, 228 F. Sup. 340; Brown v. Gardner, 387 F. 2d, 345, 1967, 4th Cir.; Philpot v. Gardner, 403 F. 2d 774, 1968, 6th Cir.

By further investigation, other cases could be added to this number. All the above cases held that they had jurisdiction to charge attorney's fee on an order for remand; seven (7) in number, wherein the appellate court holds herein the same judgments and not on remand. Said decision is in direct conflict with said 7 courts, and 4 courts all of the 4th Circuit, one of the First Circuit and one of the 6th Circuit, as shown above.

In the case of Sanitary Refrigerator Co. v. Winters, 280 U. S. 30, 34, Headnote 1, as cited also in Supreme Court Rule 58(2) holding:

"There being a conflict of opinion between the two circuits of appeals on the question of infringement, writs of certiorari were thereafter in both cases granted.

"1 Footnote — After handing down the opinion (in Sanitary case) showing the conflict as to the jurisdiction of infringement, was brought to our attention by a petition for rehearing, the certiorari was granted."

Herein the case at bar for conflict of opinions between the courts and circuit courts was not on question of infringement, but on question of whether 42 U. S. C. A. 406 (b)(1), the "judgment" as stated therein also applied to *Order on Remand*. The lower court, affirmed by the appellate court herein, held that the "Order on Remand," was not considered a "judgment."

Therefore, the above authority and case is directly in point.

WANT OF JURISDICTION

The jurisdiction of a federal court is limited to that conferred by the Constitution and statutes of the United States, and cannot be acquired or enlarged by consent, nor by waiver, nor by acquiescence, or inadvertence, nor by silence. Federal Digest under Courts, seeking key numbers 22 and 23.

"Jurisdiction cannot be conferred by consent or failure to raise the same in the trial court." Sec. 23.

TIME OF MAKING OBJECTION

"Where a court has no jurisdiction over the subject matter, it cannot be conferred by the consent of the parties. This want of jurisdiction of the subject matter cannot be waived by a failure to raise the objection in limine, or at any particular stage of the proceeding. The want of such jurisdiction may be raised even on appeal." Panama Ry. Co. v. Johnson, 289 F. 964.

In the case at bar, as we see above, where the court had no jurisdiction over the subject matter as where the trial court and appellate court here had no jurisdiction over the *order to remand* in the U. S. District Court which is prescribed by the Congressional Statute, 42 U. S. C. A., 406 (b)(1), regardless of the parties' consent and want thereof, may be raised at any stage. U. S. Envelope Co. v. Transco. Paper Co. 229 F. 576.

"The courts hold that where the court does not have jurisdiction, the reasons signed by the court for the judgment rendered do not constitute a part of the judgment." 49 C. J. S., p. 51. Sec. 22. "A judgment rendered by a court in a controversy over which the court does not have jurisdiction is a nullity." Galley v. Hendricks, 127 S. W. 2d 978; 15 Tex. Jur. 2d, p. 477, Sec. 51.

WHEREFORE, the petitioner prays that the order heretofore denying him the writ of certiorari be set aside; and now reinstate the same and grant the petition for writ of certiorari; and on further consideration reverse and remand the same; or make the proper orders that the court might think best.

Sidney E. Dawson
Attorney for Petitioner.

And in the further alternative, the petitioner states that the Court of Appeals failed to pass on petitioner's Point I, in Appellant's brief, on a motion for new trial, reading (Sup. Ap.) p. 14.

> "The court erred in the failure to hold that the court had jurisdiction under Statute 42 U. S. C. A. 406 (b) (1), providing, among other things, that in a judicial proceeding resulting in a remand in favor of the claimant, the attorney has a right for the court to set a reasonable fee for his services not greater than 25 per cent of the accrued benefits coming to the claimant.

STATEMENT

If said Court had passed on said point, it would have shown them in all probability that an order on remand by the court is the same as a judgment, and that the petitioner would be entitled to a reasonable attorney's fee under said statute in the United States District Court.

ARGUMENT AND AUTHORITIES

In the case of Schriber-Schroth Co. v. Cleveland Trust Co., 305 U. S. 61, Headnote 8, as cited also in Supreme Court Rule 58(2) holding:

> "As the Court of Appeals did not pass upon other questions in the case, the causes will be reversed and remanded to it for further proceedings, in conformity with their opinion with respect to such claims . . . in suit, as appellants below submitted to the court for adjudication."

Here petitioner had 7 different cases holding that the attorneys who were successful in their claims were entitled to a reasonable fee under said statute.

The appellate court erred on page 9 (Sup. Ap.) of his opinion wherein he states:

> "Prior to the amendment of the Act in 1965 the Secretary was authorized to prescribe a maximum fee an attorney could charge for his service for representing a claimant before the Secretary. The Act did not provide for a maximum fee other than fixed by the Secretary. . . ."

And, in addition, on the same page states:

> "In order to control the charging of inordinately large fees by claimants' attorneys and to give assurance to attorneys that they would re-

> ceive appropriate fees for representing claimants in court; the ... department ... proposed the amendment of 206..."

In answer to the two propositions set out above, petitioner states, court stated "Prior to amendment of 1965, Secretary was authorized to prescribe maximum fees;...

This leaves the impression that in this case at bar, we are under the old rule. The new amendment was passed July 30, 1965, in which we are now under, because the claimant, Lee W. Weldon, filed his application on August 9, 1965, for liability benefits. (p. 14, Ap.).

In order to take care of the claimants when the lawyers charge inordinately large fees, Congress passed the amendment of the Act July 30, 1965, wherein lawyers according to most cases prosecute their cases through two forums. One in 406(a) where the Secretary is to safeguard the claimant's rights and give the attorney a reasonable fee; the other, 406 (b) (1) where the case is tried in the judiciary, the court is to safeguard both the claimant's and attorney's rights, and to see that the attorney gets a reasonable fee, and that the claimant is protected according to law. This is shown in the case of Sims v. Gardner, 378 F. 2d, 70 (1967) Sixth Circuit, which held:

> "Purpose of statute fixing 25 per cent maximum attorney's fee representation on claim for past due social security benefits is to pre-

vent attorneys from receiving inordinately large fees . . ."

The petitioner herein contends that since the trial and appellate court holds that an order of the court for a remand is not a judgment of the court, and the social security administration has jurisdiction, deprives the court from setting the petitioner a reasonable fee herein for service rendered in said judiciary.

This so effectively discourages attorneys from handling social security cases that the claimants are deprived of the assistance of counsel.

The appellate court herein in his opinion, on page 7 holds in substance that an attorney receives as much as 25 per cent of the past due benefits from his client in the administration proceeding, he is entitled to no more, and that he is prohibited to charge 25 per cent in the district court for his services there.

It is true that the Secretary did give petitioner 25 per cent of accrued benefits coming to the claimant of $625.57, but petitioner is due $121.50 for doctors' bills and reports; take that off and it leaves petitioner $504.07 and he is not allowed anything in the judicial proceedings wherein he rendered his legal services on remand.

It appears that according to the statute, that if claimant receives substantial gains from his attorney, he is limited to not in excess of 25 per cent of the past

due benefits coming to the claimant under 406(a) and the same under 406(b)(1).

There are two distinct and independent statutes — one forum has no jurisdiction over the other.

Now how can a court pass a law to that extent? Is that encroaching upon the rights of congress to make a law holding 25 per cent is all that petitioner can get in the case at bar?

Petitioner does not believe that he has had a fair trial in this cause, and that there has been a great miscarriage of justice.

Chief Judge, Haynesworth, in the case of McKittrick v. Gardner, 378 F. 2nd (1967) 4th Cir. 872 holds, among other things:

> "At an appropriate time, the congress might consider whether or not it is an unnecessary burden upon the lawyers to require them to prosecute two separate allowance applications, if one district court would suffice."

CONCLUSION

In order that this case may receive the full consideration that justice requires, we respectfully submit that this petition for rehearing should be granted, and that a rehearing of this case should be held before a full bench, more specifically for the setting of *the cause aside for lack of jurisdiction.*

Respectfully submitted,

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Maryland
Attorney for Petitioner Also.

CERTIFICATE OF SERVICE

I, Sidney E. Dawson, Attorney for Petitioner in the above entitled cause, hereby certify that on the ____ day of November, 1970, I served the attached brief upon Miss Kathryn Baldwin, Respondent, Washington, D. C., and Erwin N. Griswold, Solicitor General, Department of Justice, Washington, D. C. 20530. All parties required to be served have been served, Rule 33, Sec. 3.

I further certify that this petition is presented in good faith, and not for delay; also certify that the petition is restricted to the grounds certified in Rule 58(2).

Sidney E. Dawson